CHAPTER 7: Sites of Environmental Contamination, Property Transfers, and Liability Issues

Purpose and Applicability of Regulations

Michigan has long been the site of substantial industrial activity. While this industry provided the basis for much of Michigan's economic strength, the long-term environmental effects of many historical industrial processes and practices were not understood. Activities that we now know to cause environmental problems were unfortunately commonplace and many historical commercial and manufacturing facilities are sites of environmental contamination. Many of the sites of environmental contamination are abandoned, idle, or under-utilized industrial and commercial properties referred to as "Brownfields." Revitalization of Brownfields to achieve a healthier, cleaner, and more productive environment for Michigan's citizens is critically important. This chapter focuses on the obligations of new owners and operators of sites of environmental contamination, including the responsibilities for liability protection and obligations known as "Due Care."

Note: Appendix B contains definitions of the various regulated groups of material found in this chapter. These defined terms appear throughout this chapter in bold lettering. In some instances, multiple agencies use the same term to describe a regulated group of material; however, its definition differs. Such terms will be followed by a dash and the acronym of the defining agency or regulation (e.g., ***hazardous substance-CERCLA*** *and* ***hazardous substance-Part 201****).*

Agencies and Their Laws and Rules

In This Chapter…

The Remediation and Redevelopment Division (RRD) of the Michigan Department of Environmental Quality (DEQ) administers programs that involve the cleanup and redevelopment of contaminated properties. The primary legislative authority for the state cleanup program is Part 201 (Environmental Remediation) and Part 213 (Leaking Underground Storage Tanks) of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (Act 451). The state program has a unique, causation-based liability scheme, land use based cleanup requirements, and a strong emphasis on redevelopment and reuse of contaminated property. Part 201 and Part 213 of Act 451 and the Part 201 Administrative Rules are available at **www.michigan.gov/deqland** (select "Land Cleanup," "Site Investigation and Cleanup"). The RRD also manages portions of the federal Superfund program, established under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Additional information regarding RRD implementation of the Superfund program is available at **www.michigan.gov/deqland** (select "Land Cleanup," "Superfund Program").

If your facility is regulated under Part 111 (Hazardous Waste Management) of Act 451, contact the Waste and Hazardous Materials Division for guidance on the applicability of Part 201 and/or Part 213 of Act 451 provisions to your facility. For more information regarding the regulation of hazardous waste, see Section 2.4 "Hazardous Waste."

If your facility includes oil, gas, or mineral wells regulated under Part 615 or Part 625 of Act 451, contact the Geological and Land Management Division for guidance on the applicability of Part 201 and/or Part 213 of Act 451 provisions to your facility.

7.1 Background

Earlier decades of industry and manufacturing practices have left some properties in Michigan environmentally degraded, contaminated with heavy metals, organic and inorganic chemicals, petroleum constituents, and containing dilapidated buildings and debris. Brownfields expansion or redevelopment is hindered or complicated by real or perceived environmental conditions. Brownfields present challenges to potential developers, whether contamination is discovered or suspected. Part 201 and Part 213 of Act 451 encourage solutions to historical contamination while protecting human health and natural resources with several incentives for redevelopment, including, causation-based liability, and liability protection for new owners.

Michigan's pre-1995 environmental cleanup and redevelopment efforts were constrained by strict liability laws. Prior to 1995, if a person purchased contaminated property, a person acquired liability for the cleanup. The June 5, 1995 amendments to Part 201 of Act 451 and the March 6, 1996 amendments to Part 213 of Act 451 substantially modified provisions of the law regarding liability for the cleanup of environmental contamination. An owner or operator of a site of environmental contamination is liable for remediation of the environmental contamination if the owner or operator is responsible for an activity causing a release or threat of release. If an owner or operator acquires a Part 201 site of environmental contamination after June 5, 1995, a baseline environmental assessment (BEA) must be conducted and disclosed to the DEQ to provide liability protection. Likewise, if an owner or operator acquires a Part 213 site of environmental contamination after March 6, 1996, a BEA must be conducted and disclosed to the DEQ to provide liability protection. For both Part 201 and Part 213 sites of environmental contamination, the owner or operator must exercise due care with respect to the contamination on the property. Owners and operators are defined by Part 201 and Part 213 of Act 451. A party leasing property would generally control or be responsible for the property and be defined as an operator.

A BEA is an evaluation of environmental conditions that exist at a facility at the time of purchase, occupancy, or foreclosure that reasonably defines the existing conditions and circumstances at the facility so that in the event of a subsequent release there is a means of distinguishing the new release from existing contamination. The Due Care measures taken must ensure that existing contamination on a property does not cause unacceptable risks and is not exacerbated. Due Care and BEA obligations are described in Sections 7.2 and 7.3.
Part 201 of Act 451 has disclosure requirements for property transfers. A person who has knowledge or information, or is on notice through a recorded instrument, that a parcel of real property is a Part 201 site of environmental contamination must provide written notice to a

purchaser or other person to which the property is transferred. The notice must advise that the property is a Part 201 site of environmental contamination and disclose the general nature and extent of the contamination.

Information regarding the obligations of an owner or operator of a Part 201 of Act 451 site of environmental contamination is contained in Section 6.4 "Release Response and Cleanup." Information regarding the obligations of an owner or operator of a Part 213 of Act 451 site of environmental contamination is contained in the Corrective Action portion of Section 4.3 "Storage Tanks."

Information regarding financial incentives for Brownfield redevelopment is available at **www.michigan.gov/deqland** (select "Land Redevelopment").

7.2 "Due Care" Requirements

Section 20107a of Part 201 of Act 451 requires that owners and operators take due care measures to ensure that existing contamination on a property does not cause unacceptable risks and is not exacerbated. Such measures include evaluating the contamination and taking necessary response actions. Due care requirements are not related to the owner or operator's liability for the contaminants; they apply to non-liable parties and liable parties alike. The due care requirements were designed so contaminated properties could be safely redeveloped.

An owner or operator of a site of environmental contamination must prevent exacerbation of the existing contamination. Exacerbation occurs when an activity undertaken by the person who owns or operates the property causes the existing contamination to migrate beyond the property boundaries. Examples of exacerbation include: the mishandling of excavated contaminated soil such that contamination from the soil pile goes off-site from blowing winds; pumping contaminated water from footing drains into a nearby ditch; or creating a new migration pathway by putting a utility line through a zone of highly contaminated groundwater. An owner or operator can also exacerbate contamination by changing the facility conditions in a manner that would increase the response activity costs for the liable party. An example might be to place a building over the source of the existing contamination. A person that causes exacerbation would be liable for remediation of the contamination they caused or paying the increase in the response activity costs.

Owners and operators must exercise due care by undertaking response activities that are necessary to prevent unacceptable exposures to contamination. The existing contamination must be evaluated to determine if the people using or working at the property would be exposed to contamination at levels above the appropriate criteria. Criteria for differing land uses can be found in the Part 201 Administrative Rules (R 299.5744-R 299.5752). For example, if groundwater used for drinking is contaminated above the drinking water criteria, then the owner and operator must provide an alternative water supply. If soils are contaminated above the direct contact criteria for the appropriate land use at the surface of the property, then people must be prevented from coming into contact with those soils by restricting access, installing a protective barrier, or removing contaminated soil. Protective barriers may be clean soil, concrete, or paving. In some instances, remediation of the contamination may be the most cost effective due care measure. In addition, if there is a potential unacceptable risk for utility workers or people conducting activities in an easement, then utility and/or easement holders must be notified in writing of the conditions by the owner or operator. If there is a fire and explosion hazard, the local fire department must be notified and the situation must be mitigated.

An owner or operator must take reasonable precautions or steps needed to prevent exposure to an unacceptable risk for a third party. This might include: notifying contractors of contamination so they can take proper precautions; preventing trespass that would result in an unacceptable exposure (e.g., neighborhood kids playing in a vacant industrial yard that has direct contact hazards); or taking actions to secure abandoned containers so they do not get damaged by traffic.

Owners and operators must maintain documentation that due care needs have been evaluated and any response actions that are needed have been taken. If applicable, maintenance and repair of the response action must also be documented. The documentation does not need to be submitted to the DEQ, but must be available for the DEQ to review upon request within eight months of becoming the owner or operator or of having knowledge that the property is a facility. Documentation requirements are described in the Due Care Administrative Rules (R 299.51007-R 299.51021). If a person is petitioning the DEQ to review a BEA, that person may request the DEQ to also review a Section 7a Compliance Analysis. This is a report of the evaluation of the due care needs and a plan for response actions. The required format and content for the Section 7a Compliance Analysis to be submitted with a BEA are provided in the BEA Instructions, available from the DEQ district offices (see Appendix C) and at **www.michigan.gov/bea**.

The Due Care Rules require notification to the DEQ and others in the following circumstances:

- Notify the DEQ using the "**Notice Regarding Discarded or Abandoned Containers Form" (EQP 4476)** if there are discarded or abandoned containers that contain **hazardous substances-Part 201** on the property.
- Notify the DEQ and adjacent property owners using the "**Notice of Migration of Contamination Form"** (**EQP 4476)** if contaminants are migrating off the property; **"**."
- Notify the local fire department if there are fire or explosion hazards.
- Notify utility and easement holders if contaminants could cause unacceptable exposures and/or fire and explosion hazards.

These notices must be made within 45 days of becoming the owner or operator, or of having knowledge of the conditions. Persons required to provide notice under Section 21309a(3) of Act 451, but who have not yet made that notice, must provide notice to the DEQ and impacted property owners within these time frames. If form EQP 3852 has not been used to notice owners, then the persons must provide notice using Form 4476 to the DEQ and impacted property owners within the required time frames. Notice under this provision does not alleviate the obligation to notice under Part 213 of Act 451.

The forms and additional guidance regarding the notifications are available at the DEQ district offices (see Appendix C) and at **www.michigan.gov/bea**.

Part 201 provides limited exemptions to the Due Care requirements. For manufacturing facilities, the exemption for an owner or operator of property where the contamination is migrating onto the property may be relevant. This exemption does not include exacerbation caused by the owner or operator. While the exemption may be applicable, it may be in the owner or operator's best interest to ensure the property is safe for the intended use.

7.3 Due Diligence and Baseline Environmental Assessments

7.3.1 Due Diligence

Due Diligence is the act of making all appropriate inquiry as to whether environmental contamination is present on a piece of property. The prospective owner or operator of commercial and industrial properties should undertake all appropriate inquiry to determine how the property was used and what activities involving the use of **hazardous substances-Part 201** occurred. The initial step in demonstrating Due Diligence is to request disclosure from the seller or owner about any known environmental conditions. The next step is to conduct an environmental assessment of the property.

The American Society for Testing and Materials (ASTM), Phase I and II environmental assessment (ASTM E1527 and E1903) standards or equivalent can be used as guidance (available at **www.astm.org**). The Phase I assessment involves physically inspecting the property, examining historical records such as deed and property tax records, a review of regulatory agency files, historical maps, and present/past property uses to evaluate the potential for contamination to exist. The Phase I walk-through of the property can identify potential contamination sources such as abandoned containers or underground storage tanks. The Phase I report will conclude with a list of Recognized Environmental Concerns (REC). An environmental professional can assist in determining if it is necessary to proceed to a Phase II investigation. The Phase II assessment involves further investigation into the RECs, including collecting soil and/or groundwater samples, and confirming if underground tanks are present,

The information gained in the Phase I and II assessments is used to determine whether the property is a facility under Part 201. The concentration of **hazardous substances-Part 201** at the property is compared to the residential criteria, the state's most protective cleanup criteria, provided in R 299.5744-R 299.5752. If the contaminant concentrations do not exceed the residential criteria, then the property is not a facility as defined by Act 451. Documentation of this conclusion should be maintained by the new owner or operator to show that they have conducted due diligence in accordance with Section 20126(3)(h) of Act 451. If the contaminant concentration does exceed one or more residential criteria, then the property is a facility. Potential owners or operators are strongly urged to discuss filing a BEA with their environmental consultants and their attorneys. There may be other options for resolving potential liability in certain circumstances.

7.3.2 Baseline Environmental Assessments (BEAs)

The purpose of the BEA is to establish the means to distinguish a new release from pre-existing contamination so the new owner or operator is not held liable for responding to releases caused by others. The BEA provides liability protection for known and unknown contamination under specific Parts of Act 451:

- Part 201 (Environmental Remediation)
- Part 213 (Leaking Underground Storage Tanks)
- Part 31 (Water Resources Protection)
- Part 17 (Michigan Environmental Protection Act)

- Part 615 (Supervisor of Wells)
- Part 625 (Mineral Wells)

A BEA does not provide protection from liability under other state and federal laws, including:

- Landfills regulated under Part 115 of Act 451.
- Treatment, Storage, and Disposal facilities regulated by the federal Resource Conservation and Recovery Act and Part 111 (Hazardous Waste Management) of Act 451.
- Underground storage tank operational requirements under Part 211 of Act 451.
- Federal CERCLA and Superfund. The United States Environmental Protection Agency (USEPA) and the DEQ have entered into an agreement that the USEPA will not take action against a person who has done a BEA unless the facility is on the federal National Priority List, federal funds have been spent to respond to conditions at the facility, or there is an imminent danger to the public health, safety, welfare, or the environment.

Part 201 of Act 451, BEA Administrative Rules, BEA Instructions for Preparing and Disclosing Baseline Environmental Assessments, and guidance are available at the DEQ district offices (see Appendix C) and at **www.michigan.gov/bea**.

BEA Categories and Future Hazardous Substance Use

The BEA must contain information on how the new owner or operator will use the property and what type of **hazardous substances-Part 201** will be used, stored, or otherwise handled on the property. The BEAs are divided into three categories based on the **hazardous substance-Part 201** use by the new owner and operator compared to the existing contamination:

- Category N: No significant **hazardous substance-Part 201** use by the new owner or operator.
- Category D: The **hazardous substances-Part 201** to be used will be different from the existing contamination.
- Category S: The **hazardous substances-Part 201** to be used will be the same as the existing contamination.

In determining what the future **hazardous substance-Part 201** use will be, it is important to evaluate the complete operation of the property, including the process materials, waste materials, **hazardous substances-Part 201** used for maintenance and repair of the equipment and facility, equipment fluids, fuels, etc. A new owner must also take into consideration significant **hazardous substance-Part 201** use by all tenants and operators who, at the time the BEA is completed, are currently in possession of, or are under agreement to take possession of all or part of the property. To determine the appropriate BEA category, the significant **hazardous substance-Part 201** use must be compared to the contaminants that are known or are likely to be present at the property. If the owner or operator changes their **hazardous substance-Part 201** use in the future, they can submit supplementary information to the DEQ that provides a mechanism to differentiate the new **hazardous substance-Part 201**

from the existing contamination. This will be filed with the BEA for future reference, but does not modify the original BEA.

BEA Conclusions

The conclusion is a vital part of the BEA. The conclusion must detail specifically how the BEA will be used to differentiate a new release from the existing contamination and why the information in the BEA is sufficient. The process and logic must be clearly explained so that a person can pick up the BEA in future years and use it to differentiate between an accidental release that has occurred and the pre-existing contamination. For a category N BEA, the conclusion must include the language in R 299.5907(2)(h) stipulating that **hazardous substances-Part 201** will not be used. For a category D BEA, the body of the BEA must have sufficient information and data to support the conclusion that the **hazardous substances-Part 201** that will be used are not already contaminants on the property. For a category S BEA, the conclusion must provide a method to differentiate a new release from the existing contamination and contain sufficient details and data to support that method. The method may include site characterization, engineering controls, isolation zones, stipulated conditions, or a combination of methods. The isolation zone or engineering control must address the entire area of existing contamination, rather than just the new storage or use area. There is specific language in R 299.5909 that must be in the petitioner's and consultant's affidavits when relying on engineering controls, isolation zones, or stipulated conditions.

BEA Time Frames

A BEA must be conducted prior to or within 45 days after becoming the owner or operator. Conducting means field work and sample analysis must be completed, conclusions drawn, and the basis of the BEA report written. The BEA must be completed within 60 days of becoming the owner or operator. The extra 15 days is allowed to finalize the report. The BEA must be submitted to the DEQ within six months of the date of completion for a petition and eight months from becoming the owner or operator for a disclosure. Engineering controls and isolation zones must be installed within 45 days of becoming the owner or operator, unless **hazardous substance-Part 201** use does not occur until the engineering controls/isolation zones are installed. The owner or operator must verify this in an affidavit. If the DEQ identifies deficiencies in the BEA petition, they can be cured within six months of the date the BEA was completed. However, if additional field work, engineering controls, or isolation zones are needed to cure the deficiencies, they must be completed within 45 days of becoming the owner or operator, unless there are no **hazardous substances-Part 201** on-site. The owner or operator must verify this in an affidavit. The DEQ encourages early submittal of BEAs whenever possible to allow time to cure identified deficiencies.

The owner or operator must document when engineering controls and isolation zones were installed and when **hazardous substances-Part 201** were first on the property. The condition of any engineering control or isolation zone must be monitored and repairs made, if necessary, to maintain the validity of the engineering controls and isolation zone. Inspections and any maintenance or repair must be documented.

Disclosure of a BEA or Petition for the DEQ Approval of a BEA

A BEA must be disclosed to the DEQ to obtain liability protection. A person also has the option of petitioning the DEQ for a review of the adequacy of the BEA. While disclosure is free, there is a $750 fee for a petition. Although the same liability protection is achieved by either a disclosure or a petition, a petition provides the petitioner with a written determination of the technical adequacy of the BEA. If the DEQ identifies deficiencies in the BEA, the petitioner may have the opportunity to cure those deficiencies within the allowed time frames to receive an adequate determination. It is recommended that owners and operators ask their financial lending institution and other parties in the transaction if they require a determination by the DEQ. For example, if the owner or operator applies for financial assistance through the Small Business Administration (SBA), the SBA typically requires a determination on both the BEA and a Section 7a Compliance Analysis.

Environmental Consultants

Part 201 specifies that a BEA must be completed by an environmental professional. Environmental consultants can be located in the yellow pages of the telephone book under Environmental, Ecological, or Engineering; by asking your financial institution for referrals. To increase the odds of hiring a good consulting firm; ask the consultant for prior job references, information concerning previous BEAs they have completed and the DEQ BEA ID numbers assigned to those BEAs. The DEQ cannot give recommendations regarding environmental consultants. Corrective actions on a site contaminated by leaking underground storage tanks must be done by a Qualified Consultant (QC). The QC list is available on-line at **www.deq.state.mi.us/sid-web/QC_Search.aspx.** Although the BEA does not have to completed by a QC, most QC firms often prepare BEAs.

7.4 Summary

This document provides a summary of the BEA and Due Care process. A thorough review of the statute, administrative rules and DEQ guidance should be completed before making site-specific decisions.

The RRD field staff located at DEQ district offices statewide (see Appendix C) are the first line of contact for prompt service about Part 201 and Part 213 of Act 451 programs.

The RRD publications and forms are available from **www.michigan.gov/deqland**, by contacting the RRD district office (see Appendix C) or by contacting the DEQ Environmental Assistance Center at 800-662-9278.

If you need further information about liability, Due Care, or BEA requirements, please contact your DEQ Remediation and Redevelopment Division district office at www.michigan.gov/deqrrd or call the Environmental Assistance Center at (800) 662-9278.

WHERE TO GO FOR HELP

SUBJECT: **Learn how to protect public water supply systems that use ground water from potential sources of contamination**

CONTACT: DEQ, Wellhead Protection Program
(517) 241-1370
www.michigan.gov/deq

SUBJECT: **Sites of contamination; property transfers, due care, and liability protection measures**

CONTACT: DEQ, RRD, District Offices (see Appendix C)

- Part 201 (Environmental Remediation)
  Rhonda Klann: (989) 626-8025 ext. 8302 or klannr@michigan.gov
- Part 213 (Leaking Underground Storage Tanks)
  Jeanne Schlaufman: (734) 953-1527 or schlaufj@michigan.gov
- General numbers: (517) 373-9837 or (800) 662-9278

www.michigan.gov/deqland
www.michigan.gov/bea

PUBLICATIONS:

1. Part 201 Citizens Guide
2. Disclosure of a Baseline Environmental Assessment (EQP 4446)
3. Instructions for Preparing and Disclosing Baseline Environmental Assessments
4. Notice of Migration of Contamination (EQP 4482)
5. Notice Regarding Discarded or Abandoned Containers (EQP 4476)
6. Questions and Answers for BEAs and Due Care
7. Petition for Baseline Environmental Assessment Determination and Optional Determination of Compliance with Section 20107a (EQP 4445)
8. Baseline Environmental Assessments - Administrative Rules
9. Section 20107a “Due Care” - Administrative Rules
10. Instructions for Preparing and Disclosing Baseline Environmental Assessments and Section 7a Compliance Analysis (CA)
11. Avoiding BEA Processing Delays
12. Questions and Answers about Reporting Migrating Contamination Under Rule 1017
13. Addresses for Submittals

SUBJECT: **Superfund Program**

CONTACT: DEQ, Remediation and Redevelopment Division
(517) 373-8815
www.michigan.gov/deqland (select “Land Cleanup” then “Superfund Program”)

SUBJECT: **Environmental consultants that can perform baseline environmental assessments (BEAs) for facilities located in Michigan's Upper Peninsula**

CONTACT: Michigan Technological University, GEM Center for Science and Environmental Outreach
(906) 487-3341
http://emmap.mtu.edu/gem/community/consultant/consult_rev.html

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SUBJECT: **Leaking underground storage tank qualified consultants that can perform baseline environmental assessments (BEAs)**

CONTACT: DEQ, Remediation and Redevelopment Division
(517) 373-8168
www.michigan.gov/deqrrd
www.deq.state.mi.us/sid-web

PUBLICATIONS: 1. Qualified Consultants (QC) List